Devita v Castellano
2021 NY Slip Op 33328(U)
June 17, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 612514/17
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

BRIEANA DEVITA,

Index No.
612514/17

Plaintiff,

-against-

JOSEPH J. CASTELLANO and ERIC N. ROSS,

Defendants.

x

ERICK N. ROSS,

Index No. 3385/19[1]

Plaintiff,

Motion Seq:
001 Mot D
002 MD

-against-

Decision/Order

JOSEPH J. CASTELLANO and BRIEANA DEVITA,

Defendants.

x

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[1] 3385/2019 is the Suffolk County Index Number assigned to this case upon its transfer from Nassau County Supreme Court on or about June 26, 2019.

The following electronically filed papers were read upon this motion:

Notice of Motion.....47-57; 65-70
Answering Papers.....59-61; 73; 77
Reply.....63; 78

Pursuant to CPLR § 3212, defendant Castellano moves for summary judgment dismissal of Erick N. Ross' complaint on the ground that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d) (Motion Sequence 001).[2] Defendant Devita cross-moves for summary judgment dismissal of the complaint on the ground that Mr. Ross has not sustained a serious injury, joining in defendant Castellano's motion in this regard, and also moving for dismissal of the complaint on the ground that she is not liable for the accident (Motion Sequence 002). After review and consideration of the submitted papers, the summary judgment threshold motions concerning plaintiff Ross' bodily injury claims are granted in part and denied in part. That branch of Devita's motion for summary judgment dismissal on the issue of liability is denied.

The motor vehicle accident giving rise to these joined actions occurred on June 21, 2016, on the Long Island Expressway, and it involved three motor vehicles traveling in the same direction. Plaintiff Devita was the middle car in the chain reaction collision; Ross' vehicle was in front of Devita's vehicle, and Castellano's vehicle was behind Devita's vehicle.

The Threshold Motions

Ross' Bill of Particulars sworn to on September 10, 2019 alleges injuries to his lumbar, thoracic, and cervical spine areas including bulging discs, bilateral facet hypertrophy, and spondylosis with straightened lordosis. Plaintiff alleges that his injuries are permanent in nature and that he experiences pain, swelling, tenderness and impairment of function of the affected body parts.

Plaintiff claims in his Bill of Particulars that he has sustained injuries under the following categories of injury provided for in Insurance Law § 5102 (d): 1) fractures; 2) significant scarring and/or disfigurement; 3) permanent consequential limitation of use of a body organ or member; 4) significant limitation of use of a body function or system; and 5); a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

As a proponent of the summary judgment motion, the defendants herein have the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys.***, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a

[2] Plaintiff Devita, under Index No. 612514/17, discontinued her claims against defendant Erick N. Ross by stipulation dated December 26, 2019, executed by all parties to this action.

matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff, Erick N. Ross (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (***Franchini v Palmieri***, 1 NY3d 536, 537 [2003]). A defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 Ad3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law.

Here, defendants Castellano and Devita have made a *prima facie* showing that Erick N. Ross has not sustained any injuries under the fracture, scarring/significant disfigurement, and 90/180 categories of injury; however, the defendants have failed to make a *prima facie* showing that the plaintiff did not suffer an injury under the permanent consequential and significant limitation categories of injury.

Defendant's examining orthopedic surgeon, Teresa Habacker, M.D., examined the plaintiff on July 22, 2020, diagnosing his cervical spine, lumbosacral spine, and thoracic spine sprains/strains as being resolved. According to Dr. Habacker's affirmed report, all range of motion measurements noted therein were obtained by the use of a goniometer and compared to the AMA Guidelines, 5th Edition; however, Dr. Habacker writes with respect to plaintiff's thoracic and lumbosacral spine areas that, "[e]xamination of the thoracic spine could not be inspected;" "[e]xamination of the lumbosacral spine could not be inspected." Dr. Habacker fails to explain what these statements mean. In this Court's estimation, those statements that the thoracic and lumbosacral spine areas "could not be inspected" raises a question of fact as to the basis for Dr. Habacker's findings if she was unable to inspect those areas of plaintiff's body. For this reason alone, the defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law with respect to the permanent consequential and significant limitation categories of injury.

With regard to Dr. Habacker's neurological examination of plaintiff, although she writes that sensation to light touch was normal for the upper and lower extremities, that no atrophy was

noted, and that muscle strength apparently yielded normal measurements, she also writes that "[n]eurological evaluation of the upper and lower extremities revealed the biceps, triceps, brachioradialis, patellar and Achilles deep tendon reflexes were not elicited." Dr. Habacker fails to explain why those deep tendon reflexes were not elicited, thereby giving rise to the question as to whether the plaintiff was unable to exhibit any of those reflexes, which would then require explanation, or whether Dr. Habacker chose not to test the deep tendon reflexes, which also requires explanation.

In the section of her report entitled "Causal Relationship," Dr. Habacker makes apparently conflicting statements. At first she attributes her "sprain/strain diagnoses" to the subject accident since "[t]here was nothing in the medical records or in the physical examination to refute causality;" yet, in that same section of her report, she states that there is a "history of prior injury, and/or pre-existing condition that may have aggravated or impacted the current injury." Dr. Habacker does not identify the "pre-existing condition," and she refers to a prior accident in which the plaintiff "experienced whiplash." Dr. Habacker continues, writing that "[t]he prior condition is not well defined," and "[w]ithout the benefit of prior records, it is not possible to determine the extent of the possible impact." Dr. Habacker does not indicate in her report that she requested prior records. Her reference to the "prior condition" is vague, and it is unknown whether she refers to a prior accident or an unidentified pre-existing condition. Then, in seeming juxtaposition to the existence of any pre-existing condition, Dr. Habacker affirms that, "[t]here is no reported history of comorbidities that may be having an impact on the injury."

Based upon the vague, confusing and contradictory statements identified herein, this Court cannot reasonably rely upon Dr. Habacker's report; therefore, it does not constitute competent evidence tending to establish the defendants' argument that they have sustained their *prima facie* burden as to the permanent consequential and significant limitation categories of injury. Since the moving defendants have failed to establish their *prima facie* entitlement to summary judgment regarding these two categories of injury, their summary judgment motions are denied as to these categories of injury without the need to consider the sufficiency of the papers submitted by plaintiff Ross (***Reitz v. Seagate Trucking, Inc.***, 71 AD3d 975 [2d Dept 2010]; ***Thomas v. Smith***, 25 AD3d 786 [2d Dept 2006]; ***Marquez v. Oballe***, 14 AD3d 667 [2d Dept 2005]).

There is, however, absolutely no evidence in the submitted record, including in plaintiff's own deposition transcript, demonstrating that Mr. Ross suffered a fracture or significant scarring and/or disfigurement as a result of the subject accident; therefore, defendants have sustained their *prima facie* burden as to these categories of injury.

Defendants have also established their *prima facie* entitlement to summary judgment as to plaintiff's 90/180 claim based upon plaintiff's own deposition testimony (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

Plaintiff's Bill of Particulars alleges that he was never confined to a hospital as a result of the accident, and that he was confined to bed and to his house for only one day following the

accident. Plaintiff returned to work on June 22, 2016, one day after the accident. Plaintiff works for an electrical contracting firm for fourteen to fifteen years at the time of his deposition. He is responsible for "running labor/crews on a daily basis, and [is] in charge of vehicle maintenance, purchasing material, invoicing, writing proposals, meeting on job sites with customers." Plaintiff had the same duties after the subject accident, although he testified that it was harder to sit through meetings without getting up and stretching, but he did not miss any time from work and did not suffer reduced pay. He also testified that, although he may have been unable to work full days on a few occasions immediately after the accident, within two weeks' time he was full-time.

Plaintiff stated that he spent more time at his desk after the accident and went out on fewer field estimates. Plaintiff further testified that in the thirty days after the accident he did not do any field work, but over the course of months he worked up to returning to the field when required. As noted, he did not suffer any demotion or loss of pay, and neither the company nor plaintiff himself kept any records of the days when plaintiff was out in the field as opposed to being in the office.

At the accident scene, according to plaintiff's own testimony, the ambulance personnel who responded merely checked plaintiff's blood pressure and they did not transport him to any hospital. Plaintiff initially declined an ambulance at all, and when the ambulance personnel offered to take him to a hospital, plaintiff declined. Plaintiff was able to drive his car home from the accident.

One or two days after the subject accident, plaintiff sought treatment from his chiropractor, Dr. Faillace. Plaintiff complained of pain and tightening in his back. Although he treated with the chiropractor for two to three months after the accident, the plaintiff never sought treatment from an orthopedist, his primary care physician, or any other medical personnel for the injuries he claims to have sustained in this accident. Once no-fault insurance stopped paying for his chiropractic visits, plaintiff stopped treating with the chiropractor, and as of the date of his deposition in April 2020, plaintiff had no plans to seek medical treatment for any injuries allegedly sustained in the accident. Plaintiff did not recall if he ever contacted his own healthcare insurance to determine whether they would cover any treatment related to this accident.

Aside from testifying that he had trouble sleeping for several months after the subject accident, and that he slept in a recliner, plaintiff was uncertain if he told his chiropractor about his difficulty sleeping, but he did complaint of pain.

When asked if there are any activities that plaintiff can still do since the accident, but with some difficulty, he testified that he has trouble jogging. He also testified that he walked regularly for exercise, but now he can only walk on straightaways, and he has trouble with hills. Aside from these activities, there are no other activities that he has difficulty doing.

When asked if there is any activity that he can no longer do as a result of the accident, plaintiff testified that his "function is 99 percent now." Plaintiff further testified that it took between six months to one year for him to return to "99 percent function." Plaintiff was asked to specify his limitations during that period, which he testified consisted of having to get up from

his desk or a meeting and stretch, or to get up and stretch if he was communing on a train. He also stated that he was unable to do his own yard work at his house, or climb ladders. Plaintiff did not testify that he had to hire anyone to perform yard work, and insofar as climbing ladders, plaintiff testified, "[w]ell, ladders, I mean, we're electricians. I get on a ladder once in a while. Not so much anymore, my younger years." Plaintiff was also asked if there was anything he could not do as of his 2020 deposition to which he responded, "No, I can't say so. Just getting older, that's all."

Since the accident in 2016, plaintiff was able to travel by airplane to various destinations for pleasure, including to Madrid, Scotland, Paris, Arizona and Texas. Plaintiff could not specify when or where he first traveled following the subject accident, but he stated that he had no problems on any of the flights.

Based upon the foregoing, the defendants have established their *prima facie* entitlement to summary judgment as a matter of law as to the fracture, scarring/disfigurement, and 90/180 categories of injury. Plaintiff's own deposition testimony is insufficient to demonstrate that he was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]).

Plaintiff is now required to come forward with sufficient evidence to rebut defendant's showings as they relate to the fracture, scarring and 90/180 claims of injury. In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d) (*see* ***Toure, supra; Scheer v Koubek***, 70 NY2d 678, 679 [1987]; ***Munoz v Hollingsworth***, 18 AD3d 278, 279 [1st Dept 2005]). Furthermore, a plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that he did not sustain a serious injury, merely by relying on documented subjective complaints of pain (***Uddin v Cooper***, 32 AD3d 270, 271 [1st Dept 2006] *lv to appeal denied* 8 NY3d 808 [2001]).

In opposition, plaintiff submits, *inter alia*, the affirmation of counsel, which is not evidence, a collection of chiropractic records, an MRI report and x-ray reports, and plaintiff's affidavit sworn to on January 27, 2021. Notably, plaintiff's affidavit fails to allege any fractures and/or scarring/disfigurement; accordingly, defendants are granted summary judgment dismissal of those two categories of injury.

Most of the remainder of plaintiff's affidavit comports with his deposition testimony; however, his claims that he was "unable to get any sleep for at least six months," and that he was "an avid jogger" prior to the accident are self-serving and inconsistent with his deposition testimony. Plaintiff testified at deposition that he had trouble sleeping, not that he was unable to get any sleep; plus, plaintiff testified that he had no specific recollection of telling his chiropractor that he had trouble sleeping. As to the jogging, plaintiff was asked about his frequency of jogging in 2015 and the first half of 2016, to which he answered, "just minimal;" "[m]aybe jog a mile three times a week." Accordingly, plaintiff's recent affidavit is designed to create a feigned issue of fact; therefore, it is unavailing.

The submitted medical records/reports appear to have been reviewed by Dr. Habacker; therefore, the Court will consider them in reviewing the opposition papers (*see* ***Williams v. Clark***, 54 AD3d 942, 943 [2d Dept 2008]; ***Zarate v. McDonald***, 31 AD3d 632, 633 [2d Dept 2006]).

The x-ray reports related to plaintiff's cervical and lumbosacral spine do not relate any of the findings noted therein to the subject accident, but there is a notation about degenerative disc disease with degenerative changes at the T12-L1 and L5-S1 levels in the lumbosacral spine. The MRI report related to plaintiff's lumbar spine likewise fails to relate any of the findings to the subject accident, or even mention the subject accident. These reports also demonstrate that plaintiff did not suffer any fractures.

None of the chiropractic reports considered by this Court provide any evidence whatsoever supporting plaintiff's 90/180 claims. The reports themselves consist of a number of graphs that are incapable of interpretation by this Court, and there is nothing written in those reports indicating that the chiropractor advised the plaintiff to refrain from performing any of his activities of daily living. The Court notes that there is no affidavit from the chiropractor informing the Court as to the meaning of these reports vis a vis the subject accident's impact upon the plaintiff.

Thus, defendants' summary judgment motions are granted as to the fracture, scarring/disfigurement and 90/180 categories of injury and denied as to the permanent consequential and significant limitation categories of Insurance Law § 5102 (d).

Devita's Liability Motion

In support of this branch of her cross-motion, defendant Devita submits, *inter alia*, her own deposition testimony and the deposition testimony of co-defendant Castellano.

The Court recognizes that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision (***McCoy v. Zaman***, 67 AD3d 653 [2d Dept 2009]; ***Velasquez v. Denton Limo., Inc.***, 7 AD3d 787 [2d Dept 2004]). The Court further recognizes that "where a stopping vehicle is rear-ended and propelled into the vehicle in front of it, such facts provide a non-negligent explanation sufficient to relieve the operator of the stopping vehicle from liability" (***Katz v. Masada II Car & Limo Service, Inc.***, 43 AD3d 876, 877 [2d Dept 2007]; ***Harris v. Ryder***, 292 AD2d 499 [2d Dept 2002]; ***Campanella v. Moore***, 266 AD2d 423 [2d Dept 1999]; ***Escobar v. Rodriguez***, 243 AD2d 676 [2d Dept 1997]).

Devita's and Castellano's versions of the accident diverge in some material respects warranting denial of Devita's motion for failure to carry her *prima facie* burden. Devita states that her vehicle was twice impacted from behind by Castellano's vehicle while both were traveling in the left lane of the highway, thereby pushing her into the Ross vehicle twice, and accounting for what she testified were four impacts: first to the rear of her vehicle, then to the

rear of the Ross vehicle, then to the rear of her vehicle, and finally to the rear of the Ross vehicle for the second time. Devita also testified that she could not be sure where her right foot was located at the time of the various impacts, whether on the gas, brake, or somewhere else.

In contrast, Castellano not only testified that there was only one impact between the front of his vehicle and the rear of Devita's white-colored vehicle, but he testified that the accident occurred in the middle lane of the highway, after he changed lanes from the right lane to the middle lane, "and next thing I know, the white car was in the middle lane and I had no idea where it came from."

The Court is compelled to note that Ross' deposition testimony is not submitted by defendant Devita upon this branch of her motion; however, the Court will not ignore Ross' testimony as it is part of the record (see CPLR § 3212 [b]).[3] As previously set forth herein, Ross testified that the rear of his vehicle was impacted twice by Devita's vehicle. Prior to the first impact to the rear of his vehicle, Ross did not hear another impact. It was only after the first impact to his vehicle that Ross heard the sound of a collision followed by a second impact to the rear of his vehicle. Accordingly, a question of fact is raised as to whether Devita impacted the rear of Ross' vehicle prior to the rear of her vehicle being impacted by Castellano. Additionally, questions of credibility are raised, which cannot be determined by this Court upon a summary judgment motion. Thus, even if Devita had established her *prima facie* burden on the issue of liability, her motion would have to be denied in any event since Ross' deposition testimony is offered in opposition, and as noted, it raises material issues of fact necessitating a trial.

For all of these reasons, that branch of Devita's motion seeking summary judgment dismissal of the complaint against her on the issue of liability is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 17, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]

[3] Ross' deposition testimony is cited in Castellano's counter-statement of facts (NYSCEF Doc # 77) and in opposition to this branch of Devita's motion.